No. 94-1387

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In The

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A., et al.,

Petitioners,

v.

LUCIEN B. CALHOUN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED, THE JAPAN SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE LONDON STEAMSHIP OWNERS MUTUAL INSURANCE ASSOCIATION LIMITED, THE NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, AND THE WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and The West of England Shipowners Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the petitioners.

Petitioners and respondents have given their consent to the filing of this brief, and their attorneys' letters granting consent are being filed with the Clerk of the Court in conjunction with this brief.

INTEREST OF AMICI CURIAE

Amici comprise fifteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of

shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991). The members of *amici* are owners and operators of ships of practically all maritime nations. In the aggregate, *amici* insure tens of thousands of vessels totaling in excess of 400 million gross registered tons, or about 90% of the world's merchant ocean-going tonnage. *Amici* protect their members in respect of most of the liability risks that arise from the operation of vessels in international maritime commerce.

One significant liability risk for which *amici* insure their members is the risk that vessel owners will be held liable for damages for death or personal injury. *See, e.g.*, BUGLASS, *supra*, at 389-396. *Amici* and their members are particularly concerned about the deaths and injuries of seamen and other maritime workers, but there are also situations in which a member (and thus one of the *amicus* associations) might be liable for the death or injury of a recreational boater (*e.g.*, if a recreational boater collided with a vessel owned or operated by a member). Thus *amici* have a vital interest in the proper interpretation of the legal standards under which liability for death or personal injury may be imposed, including the choice between federal law (*i.e.*, acts of Congress and the general maritime law established by this Court and the lower federal courts) and state law.

Amici accordingly file this brief urging the Court to reverse the decision below and hold that any recovery for death or personal injury in a maritime case is governed

by relevant federal statutes and the general maritime law, which displace state law.

SUMMARY OF ARGUMENT

This is unquestionably a maritime case (*i.e.*, a case within the federal courts' admiralty jurisdiction), which means that the same substantive law applies whether the plaintiffs bring the action "in admiralty" or "on the law side" (relying on diversity jurisdiction).

Once this is recognized as a maritime case, federal law presumptively applies. It is possible to overcome this presumption, however, so that in appropriate circumstances state law may provide rules of decision in maritime cases. Unfortunately, no clear rule identifies those circumstances. This case offers the opportunity to clarify this important area of the law, and to provide the guidance that lower courts and private parties need.

The theories that have emerged from the current jurisprudence to identify when state law may apply are inadequate. *Amici* thus urge the Court to adopt two principles to govern the choice between federal and state law in maritime cases: (1) Federal law shall apply in the absence of a strong policy justifying the application of state law in a particular class of cases, and (2) When federal law should apply, federal courts have a duty to formulate the general maritime law as necessary.

Federal law should supply the rule of decision in maritime personal injury and death cases whatever

approach the Court takes here. Under the proposed principles advocated here, this conclusion is self-evident. But even under the inadequate theories that have emerged from the current jurisprudence, the decision below should be reversed.

Finally, *amici* urge the Court to resolve the important issue discussed here regardless of the answer it gives to the question posed in the order granting certiorari. Reversing on the procedural question without reaching the principal issue raised by this case would be a wasteful use of judicial resources and would leave the parties and the courts below in an intolerable position.

ARGUMENT

I

This Case is Within the Federal Courts' Admiralty and Maritime Jurisdiction

A. The Requirements of Admiralty Jurisdiction

Over the course of four decisions, this Court has firmly established the test for admiralty jurisdiction in maritime tort cases. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S. Ct. 1043 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Two requirements must be satisfied: a location requirement and a connection with maritime activity requirement. *See, e.g., Grubart*, 115 S. Ct. at 1048.

The accident here occurred on navigable waters, in the ocean off the coast of Puerto Rico, thus satisfying the first requirement. The second is equally clear, for this Court recognized in *Foremost* that a collision between two vessels – even two pleasure boats – satisfies the connection with maritime activity requirement. 457 U.S. at 674-677. Indeed, for jurisdictional purposes this case is virtually indistinguishable from *Foremost*.[1]

As both requirements are satisfied, this is a case within the admiralty jurisdiction – a "maritime case."

B. The Importance of Admiralty Jurisdiction for Choice of Law

The court below stated in a footnote, "we doubt that the existence or non-existence of admiralty jurisdiction matters to the question of remedies." Petition ("Pet.") at A-7 n.5, 40 F.3d at 626 n.5. This statement is plainly wrong. If this were not a maritime case, the district

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[1] Unlike *Foremost*, one vessel was at anchor here, but that makes no difference to the jurisdictional analysis. *Sisson* recognized that "the storage . . . of a boat . . . on navigable waters" itself has a substantial relationship to a traditional maritime activity. 497 U.S. at 365-367. The record is unclear whether the anchored vessel was commercial or recreational, but any distinction on this score would simply bring the present case closer to "the heart of admiralty jurisdiction." *Id.* at 362 ("protecting commercial shipping is at the heart of admiralty jurisdiction"). Perhaps the most significant distinction with *Foremost* is the location. The accident here took place in the ocean, the classic highway of maritime commerce, whereas the *Foremost* accident took place in a shallow river "seldom, if ever, used for commercial traffic." 457 U.S. at 670 n.2. Again, the present case is even more clearly within the admiralty jurisdiction.

court's jurisdiction could only have been in diversity, where there would have been no basis for applying substantive federal law. The remainder of the footnote, however, suggests that the court of appeals instead meant to convey a different (and non-controversial) point: in a maritime case (*i.e.*, a case within the admiralty jurisdiction), the application of maritime law does not depend on whether the plaintiff brings the action "in admiralty" (relying on FED. R. CIV. P. 9(h)) or "on the law side" (relying on some other basis for jurisdiction, such as diversity).

As this Court recognized in *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411 (1953), the same substantive law applies in all maritime cases, whether brought "in admiralty" or "on the law side." The *only* differences are those procedural issues spelled out in FED. R. CIV. P. 9(h). Thus a federal court exercising diversity jurisdiction in a maritime case must apply the same substantive law that would have applied if the case had in fact been brought "in admiralty." *See also, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

Furthermore, if a maritime case is brought in state court under the "saving to suitors clause" of 28 U.S.C. § 1333(1), the state court is obligated to apply the same substantive law that the federal admiralty court would have applied. This rule, known as the "reverse-*Erie*" doctrine, has been recognized by this Court at least since *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). *See also, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223 (1986).

In short, it is essential to recognize that this is a maritime case. And once that recognition is made, it follows that the same substantive rules should apply regardless of the forum in which the case is heard.

II

Federal Law Presumptively Applies in Maritime Cases

A. Traditional Doctrine

The court below claimed that there is a "presumption against preemption" of state law by federal maritime law. Pet. at A-30, 40 F.3d at 638; *see also* Pet. at A-13, 40 F.3d at 630. Although such a statement may be true in other areas of law, it has no application in admiralty. This Court has long recognized that " '[w]ith admiralty jurisdiction comes the application of substantive admiralty law.' " *Grubart, supra,* 115 S. Ct. at 1054 (quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986)). *See also, e.g., Executive Jet, supra,* 409 U.S. at 255 (satisfying jurisdictional requirements "invokes . . . the full panoply of the substantive admiralty law").

This traditional doctrine has had a major influence on the lower federal courts, which have regularly held that substantive maritime law follows almost automatically from a finding of admiralty jurisdiction. *See, e.g., Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1547 (CA11 1994); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (per curiam), *cert. dismissed*, 115 S. Ct. 31 (1994); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087-88 (CA2 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 316-325 (CA5 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

Even the state courts have widely applied something close to the traditional rule. *See, e.g., Choat v. Kawasaki Motors Corp.*, 1994 AMC 2626, 2628 (Ala. 1994); *Stanton v. Bayliner Marine Corp.*, 123 Wash.2d 64, 68, 866 P.2d 15, 17-18 (1993), *cert. denied*, 115 S. Ct. 78 (1994); *Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.), *cert. denied*, 502 U.S. 908 (1991); *Irvin v. Amerada Hess Corp.*, 191 A.D.2d 478, 479, 594 N.Y.S.2d 324, 325 (1993); *Lipworth v. Kawasaki Motors Corp. U.S.A.*, 592 So.2d 1151, 1154 (Fla. App.) (per curiam), *writ denied*, 601 So.2d 552 (Fla.), *cert. denied*, 113 S. Ct. 465 (1992).

Under the traditional admiralty view, there is more than a *presumption* for a federal rule of decision; federal maritime law applies instead of state law as soon as the case is recognized as "maritime." *See, e.g.*, DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 275 (1970) ("It seems always to have been regarded as so obvious as to necessitate no explanation or argument that the same considerations that constitute 'cases of admiralty and maritime jurisdiction' appropriate for decision by a separate tribunal indicate that such cases call for the application of separate substantive law.").

B. Exceptions to the Traditional Rule

It would be convenient if it were possible to end the choice-of-law analysis with the traditional rule, but that would be inconsistent with this Court's recognition of a number of situations in which state law has a role to play in governing maritime affairs. As recently as last year, the

Court held in *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994), that a state court deciding a maritime case could apply a state procedural rule. Earlier this year, the Court recognized in dicta that the "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law." *Grubart, supra*, 115 S. Ct. at 1054. And, of course, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), and the jurisprudence that has developed under it recognize a substantial role for state law in marine insurance disputes. As the court explained in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959), "to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."

These exceptions to the traditional rule demonstrate that the rule is not absolute, but its continued repetition proves that there is at least a strong presumption in favor of substantive federal maritime law when a case falls within the admiralty jurisdiction.

Unfortunately, there is no clear rule for deciding when the presumption (and thus federal law) applies or when state law supplies the rule of decision notwithstanding the maritime nature of the case. Justice Frankfurter noted that the issue was "highly intricate," *ibid.*, and went on to describe "[d]eterminations of this nature" as "among the most difficult and subtle that federal courts are called upon to make," *id.* at 375. The court below described the problem as "delicate," Pet. at A-42, 40 F.3d at 644, and "extremely tricky," Pet. at A-10, 40 F.3d at 628. Last year, JUSTICE SCALIA, writing for the Court

in *American Dredging*, was particularly forthright in noting the confusion in this area:

> It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.

114 S. Ct. at 987. Other courts and commentators have echoed this criticism.[2] *See generally* Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (July 1995) (forthcoming).

This case offers the Court the opportunity to clarify this "highly intricate" branch of the law, providing the guidance that lower courts need to decide the cases before them and that commercial parties (such as *amici* and their members) need to order their affairs.

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[2] *See, e.g., Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (CA1 1994) ("one might tack a sailboat into a fog bank with more confidence" than to discern whether federal maritime law preempts state legislation); *Rodrigue v. Legros*, 563 So.2d 248, 253 (La. 1990) ("Despite [the] multitude of cases involving the applicability of state law in maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the constitution. Instead, the Court has generally stated only its conclusion as to whether the application of state law was permissible, and these conclusions have not always been theoretically consistent."); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 164 (characterizing the Court's admiralty-federalism decisions as "a complex maze of technical differentiations").

III

The Federal/State Choice of Law Determination

The choice between federal and state law is at the heart of this case. Although it is clear that there is a presumption for federal law in maritime cases, and equally clear that state law nevertheless supplies the rule of decision in some contexts, the Court has provided no clear and consistent approach for deciding what those contexts may be. This case offers the Court an opportunity to provide desperately needed guidance in this field.

A. The Inadequacy of Existing Approaches

Despite the confusion in the jurisprudence recognized by this Court in *American Dredging*, *see supra* at 10-11 & n.2, two principal[3] theories have emerged to explain when state law can provide the rule of decision in maritime cases: the "gap" theory and the "maritime-but-local" theory. Under the former, state law could validly be applied where there are "gaps" or "voids" in the general maritime law. *See generally* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 167. Under the latter, state law could validly be applied "[w]hen there is no need for a uniform law because of the local nature of the business engaged in by the parties." *Id.* at 179.[4] Unfortunately, neither approach has worked.

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[3] Professor Robertson identifies five different approaches, but recognizes two of them as the most important. *See generally* Robertson, *Displacement*, *supra*, part II.D.

[4] Both theories find support in the decisions of this Court. On occasion, both theories find support in the same decision of

Professor Currie succinctly dismissed the gap theory:

> The gap theory was difficult to apply and artificial at best. It appeared to make the result depend on whether the issue had been previously adjudicated, ignored the policies of the states and the admiralty, and to a great extent denied the creative powers of the admiralty courts. Moreover, it failed to explain the cases.

Id. at 168.[5] As Currie hinted, the admiralty courts often use their "creative powers" to fashion new rules of general maritime law. *See infra* at 17 & n.7. The gap theory either ignores this possibility or fails to distinguish between cases in which the court should exercise this option and cases in which it should apply state law. Furthermore, the theory does not predict whether the absence of a maritime rule allowing recovery in a particular situation is a gap in the general maritime law or a rule that no recovery is available. *See, e.g., Hess v. United States*, 361 U.S. 314, 330 (1960) (Harlan, J., dissenting) ("It

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this Court! *See, e.g., Western Fuel Co. v. Garcia*, 257 U.S. 233, 240 (1921) ("the maritime law as generally accepted by maritime nations leaves the matter untouched"); *id.* at 242 ("subject is maritime and local in character"). Nevertheless, the theories are fundamentally opposed. The gap theory permits state law to apply when there is no existing general maritime law rule, regardless of whether the issue at hand is deemed "local." In contrast, the maritime-but-local theory would permit state law to preempt inconsistent general maritime law if the issue at hand is "local" enough. *See generally* Robertson, *Displacement, supra*, part II.D.

[5] For other criticism, *see, e.g.*, GILMORE & BLACK, *supra*, at 69; Robertson, *Displacement, supra*, part II.D.; Laughlin, *Choice of Law in the Federal Admiralty Court*, 10 J. MAR. L. & COM. 165, 181 (1979).

has been said that the application of state wrongful death statutes is permitted to 'fill a void' in maritime law. . . . But there is a 'void' only in the sense that there is an absence of a right of action in such cases; admiralty does not lack a rule on the subject.").

The "maritime-but-local" theory is a meaningless empty vessel. To have any value, it must be filled with other concepts – most of which are equally indeterminate – such as "interest analysis," *see, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 739-741 (1961), or "traditional police powers of the states," *see, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328 (1973). The theory has no predictive power, and thus offers no guidance to the bench or bar. Consider, for example, the theory when supplemented with interest analysis. JUSTICE SCALIA has aptly captured the weakness of this approach in another "vertical conflict" situation where a choice must be made between state and federal law:

> This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (SCALIA, J., concurring) (citation omitted); *see also, e.g.*, CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 404 (5th ed. 1994).

B. Federal/State Choice of Law Principles in Maritime Cases

Amici respectfully urge the Court to adopt the following two principles to govern the choice between federal and state law in maritime cases: (1) Federal law shall apply in the absence of a strong policy justifying the application of state law in a particular class of cases, and (2) When federal law should apply, federal courts[6] have a duty to formulate the general maritime law as necessary.

1. Federal Law Shall Apply in the Absence of a Strong Policy Justifying the Application of State Law in a Particular Class of Cases. This first principle builds on the recognition that federal maritime law presumptively applies in an admiralty case. Because of the presumption, there must be a strong policy to overcome it. Furthermore, the policy determination must be made with due regard for the Supremacy Clause implications of the subject. No matter how strong the state considers its interest in applying a local rule, it cannot preempt an act of

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[6] Although state courts do not have a duty to fashion new rules of general maritime law, a state court should be required to predict the rule that the federal courts would fashion. This is the mirror image of a federal court's duty to predict how the state courts would decide a question of state law that is relevant in a federal case. *See, e.g.*, 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 89 (1982). The impact of this requirement in the particular case before the court would be the same as if the state court had simply formulated a new rule itself, but a state court's prediction would not be authoritative in future cases – just as a federal court's conclusion regarding the proper interpretation of state law is not authoritative. *See, e.g., Meredith v. Winter Haven*, 320 U.S. 228, 237-238 (1943).

Congress or an established principle of general maritime law that properly governs the case. Similarly, state policies should not be permitted to interfere with fundamental aspects of maritime law, or to impair "the free flow of maritime commerce." *American Dredging, supra,* 114 S. Ct. at 990 (SOUTER, J., concurring).

American Dredging illustrates one "strong policy justifying the application of state law in a particular class of cases." Every sovereign has a strong interest in the application of its own rules of procedure in its courts. Thus the first principle permits state procedural rules to apply in state courts. *See generally* Robertson, *Displacement, supra,* part V.B.2. Other cases in which this Court has permitted the application of state law are similarly supported by strong policy reasons affecting a particular class of cases. In *Wilburn Boat,* for example, the Court specifically addressed the strong policy – endorsed by Congress – of leaving the regulation of insurance to the states to the extent possible. *See* 348 U.S. at 316-319.

In some cases, however, this court has permitted state law to apply in the absence of a strong policy reason supporting that result, typically because there was need for a rule of decision and federal maritime law did not provide one. The best illustration of this can be found in the court's wrongful death cases prior to *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970). As discussed below, *see infra* at 19-20 & n.8, these cases should have been governed by the second principle.

2. When Federal Law Should Apply, Federal Courts Have a Duty to Formulate the General Maritime Law as Necessary. Although there have been notable

exceptions (such as the wrongful death cases prior to *Moragne, supra*), this Court has long recognized its power to formulate the general maritime law. In *Moragne* itself, for example, the Court created a remedy for maritime wrongful death – the principle of particular relevance in this case. But *Moragne* is not unique. Just last year, in *McDermott, Inc. v. AmClyde*, 511 U.S. ___, 114 S. Ct. 1461 (1994), the Court fashioned a maritime percentage-fault rule for crediting a defendant with a partial settlement between a plaintiff and another tortfeasor. Other prominent examples from the maritime personal injury field include *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (formulating a maritime right of contribution among tortfeasors), and *Kermarec, supra*, 358 U.S. at 629-632 (formulating a general maritime negligence rule without regard for the victim's licensee status).[7] As the Court declared earlier this year, "in admiralty . . . 'the Judiciary has traditionally taken the lead in formulating flexible and fair remedies.' " *City of Milwaukee v. Cement Division*, 515 U.S. ___, 115 S. Ct. 2091, 2095 (1995) (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)).

The power to formulate new rules of general maritime law carries with it a responsibility. As the late Judge John R. Brown explained,

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[7] Lower federal courts have also frequently recognized their power to fashion new rules of general maritime law. *See, e.g., Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49, 53 (CA5 1992) (fashioning a rule of liability for maritime trespass); *Byrd v. Byrd*, 657 F.2d 615, 621 (CA4 1981) (fashioning a maritime rule on interspousal immunity).

> [Article III's admiralty clause] is the only grant of jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article. Oddly, the Constitution does not contain a similar grant of specific authority to Congress over admiralty and maritime law.
>
> The grant of judicial power to the federal courts in Article III of the Constitution also imposes the duty on admiralty judges to exercise that power. This duty requires that the admiralty judges declare the governing principles of maritime law.

Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. MAR. L. & COM. 249, 251 (1993) (footnotes omitted). The existence of this duty is also implicit in a number of this Court's rulings. *See, e.g., Reliable Transfer, supra,* 421 U.S. at 409 (" 'Congress has largely left to this Court the *responsibility* for fashioning the controlling rules of admiralty law' ") (quoting *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963)) (emphasis added); *Moragne, supra,* 398 U.S. at 396 (noting "this Court's traditional *responsibility* to vindicate the policies of maritime law") (emphasis added). By exercising their power and fulfilling this duty, the federal courts enable the general maritime law to develop and improve. If federal courts lacked this power, or declined to use it, maritime law would not keep pace with the changing needs of the maritime world.

When formulating new principles, the federal courts can look to a wide variety of sources. In *McDermott,* for example, the Court relied heavily on the American Law

Institute's *Restatement (Second) of Torts*. *See* 114 S. Ct. at 1465. One source, of course, could be state law. *See, e.g., Moragne, supra*, 398 U.S. at 390 (relying on state wrongful-death statutes to justify creation of maritime wrongful death remedy). But when a federal court "adopts" or "incorporates" state law into the general maritime law, the law so applied is now federal, and will apply as federal law in future cases. Furthermore, when a federal court looks to state law as a model for general maritime law, it is under no obligation to prefer the law of the state in which it sits or the law of the state with the closest connection to the case before it. *Cf. East River, supra*, 476 U.S. at 864 & n.2 (applying general maritime principles drawn from state and federal sources, but not looking specifically at the law of the forum state). The court should search for the most appropriate rule, even if only a minority of the states have adopted it. *Cf. Kermarec, supra*, 358 U.S. at 629-632 (formulating a general maritime law rule based on principles that state courts have not yet adopted).

Although this second principle permits federal courts to look to state law for inspiration, state law should never apply of its own force except as provided under the first principle. *See supra* at 15-16. In particular, state law should never apply simply to fill a "gap." If there is a gap in the general maritime law, the federal courts have a responsibility to provide the rule themselves, and should not defer to a different sovereign, which is not responsible for maritime law.[8] And state law should not apply

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[8] Prior to *Moragne*, this Court looked to state law to provide a wrongful death remedy. *See, e.g., The Tungus v. Skovgaard*, 358

simply because a maritime matter is only of "local" concern unless there is "a strong policy justifying the application of state law." Since *Executive Jet*, this Court's requirements for admiralty jurisdiction have ensured that a maritime case is never of merely local concern.

IV

Federal Maritime Law Should Supply the Rule of Decision in Maritime Personal Injury and Death Cases

Although *amici* urge the Courts to announce a test governing the choice between federal and state law in maritime cases generally, federal law should supply the rule of decision in maritime personal injury and death cases whatever approach the Court takes here.

A. The Proposed Principles

Under the proposed principles, it is self-evident that this case should be governed by the general maritime law. There is no "strong policy justifying the application of state law" to overcome the presumption in favor of federal law in maritime injury and death cases. The subject has long been at the core of admiralty practice, as is obvious from the high proportion of this Court's admiralty cases that involve personal injury and death. Even

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U.S. 588, 591 (1959); *The Hamilton*, 207 U.S. 398, 402-406 (1907). These cases, which have already been overruled – or at least superseded – by *Moragne*, were inconsistent with the second principle proposed here. The correct approach is the one taken by this Court in *Moragne:* formulation of a maritime wrongful death remedy to fill the gap.

in those cases where the courts have permitted state law to supply the substantive rule of decision in an injury or death case, it has not been based on a strong policy justifying the application of state law; rather, it has generally been based on the perceived need to fill a gap in the law or the conclusion that the federal interest was so weak that state law would not interfere with essential characteristics of maritime law.

Under the first principle, the district court below was correct to hold that federal maritime law applies. Furthermore, under the second principle the district court was correct to formulate new maritime rules to fill any gaps that it perceived in the existing general maritime law. The court of appeals should have reviewed those conclusions and decided whether it agreed with the district court's formulation of the general maritime law. This Court should now reverse the decision below and remand the case to the Third Circuit so that it can address the question certified by the district court.

B. The Gap Theory

Amici feel that the "gap" theory offers no useful guidance and that this Court should therefore reject it. *See supra* at 13-14. To the extent that the gap theory influences the Court's thinking on this case, however, the decision below must still be reversed. There simply is no gap here that could justify a federal court's applying state law.[9]

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[9] If the Court were to find that there is a gap in the general maritime law with respect to recreational boaters in territorial waters, and if the Court were to decide to turn to state law

Although this Court's decisions do not answer every question that might arise in the present litigation, *Moragne* clearly sets the parameters. Subsequent cases such as *Offshore Logistics, supra; Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), offer further guidance. Moreover, this Court is not the sole source of federal maritime law. Other federal courts have faced questions virtually indistinguishable from those at issue here,[10] and their conclusions are all part of the general maritime law that the Third Circuit should have consulted before concluding "that admiralty law simply has not spoken to the factual situation of this case," Pet. at A-10, n.7, 40 F.3d at 628 n.7.

Even if there had been a gap in the general maritime law, the court of appeals should have formulated a rule to fill it. Many of the issues in this litigation are resolved by decisions of this Court. Most, if not all, of the remaining

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rather than filling the gap itself, the opinion should make clear how narrow the gap is. A broad opinion suggesting that it is appropriate to apply state law in maritime personal injury and death cases would cause great confusion outside the recreational boating context, particularly with respect to seamen and other maritime workers (such as longshore and harbor workers) where there is no suggestion that serious gaps in the law exist. *Cf. infra* note 11.

[10] The most notable example of another federal court's answers to the questions at issue here is found in *Wahlstrom, supra*, 4 F.3d at 1089-94, a virtually indistinguishable case. *See also, e.g., Mink, supra*, 29 F.3d at 1547-49; *Sutton v. Earles*, 26 F.3d 903, 914-917 (CA9 1994); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (CA5 1994); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (per curiam), *cert. dismissed*, 115 S. Ct. 31 (1994); *Walker v. Braus*, 995 F.2d 77, 81-82 (CA5 1993); *Barbe v. Drummond*, 507 F.2d 794, 797-800 (CA1 1974).

questions have been addressed by other federal courts. The Third Circuit should have supplied any new principles that it still thought necessary rather than accepting a state-federal patchwork that would create confusion and undermine the uniformity that is so essential to maritime law. Looking to state law to fill any gaps in this context is entirely inconsistent with the underlying rationale of both *Moragne* and *Miles*.

C. The Maritime-but-Local Theory

Amici feel that the "maritime-but-local" theory offers no useful guidance and that this Court should therefore reject it. *See supra* at 14. To the extent that the theory influences the Court's thinking on this case, however, the decision below must still be reversed. A fatal collision between two vessels in the navigable ocean waters is not simply of local concern.[11] Indeed, the Court implicitly recognized this conclusion in *Foremost, supra,* when it held that a collision between two recreational boats in a shallow Louisiana river "seldom, if ever, used for commercial traffic," 457 U.S. at 670 n.2, was within the admiralty jurisdiction. The Court's entire rationale was based

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[11] If the Court were to find that a recreational boating accident is simply of local concern, the opinion should make clear that this analysis would not extend to maritime personal injury and death cases outside the recreational boating context, particularly cases involving seamen and other maritime workers (such as longshore and harbor workers). *Cf. supra* note 9. Seamen and other maritime workers are involved in the maritime commerce that is at "the heart of admiralty jurisdiction." *Sisson, supra,* 497 U.S. at 362 ("protecting commercial shipping is at the heart of admiralty jurisdiction").

on the need for a uniform, maritime remedy – the federal remedy of the general maritime law. *See id.* at 674-677. Its reasoning would have been entirely nonsensical if state law had been intended to provide the rule of decision on remand.

V

The Court Should Resolve the First Question Presented in the Petition Regardless of Its Ruling on the Procedural Question Posed in the Order Granting Certiorari

In the order granting certiorari, the Court requested the parties to brief and argue a question concerning the scope of the courts of appeals' authority under 28 U.S.C. § 1292(b). *Amici* have no interest in the resolution of this issue, and thus express no view on the proper answer to the question. Whatever the resolution may be, however, *amici* respectfully urge this Court to answer the first question presented in the petition.

The first question raises an important issue not only to the parties but to the entire maritime industry. *See supra* at 3. The current state of the law is unsatisfactory. *See supra* at 10-11 & n.2. The Court should therefore take this opportunity to establish a clear and predictable test for determining whether federal or state law governs a particular aspect of a maritime case.

If the Court concludes that the Third Circuit had jurisdiction over the district court's entire order, there will be no bar to reaching question 1. But if the Court concludes that the Third Circuit's role should have been limited to answering the controlling questions of law, it

might be tempting to vacate the decision below and remand for further proceedings without ruling on question 1. This would be a particularly wasteful use of judicial resources.

If the Court vacated and remanded without answering question 1, the Third Circuit would face a difficult choice. It could either (1) answer questions that would, in its view, ultimately prove irrelevant or (2) reconsider its prior decision under FED. R. APP. P. 5(a) to accept the appeal. In either case, the district court, knowing that the Third Circuit disagreed with its decision to apply federal law, would face another awkward choice when the case returned for trial. It could (1) conduct the trial under federal law, knowing that its judgment was likely to be reversed if the court of appeals adhered to its views on a second appeal, (2) reconsider its choice-of-law ruling based on its knowledge of the vacated opinion, or (3) certify a second appeal under 28 U.S.C. § 1292(b), this time identifying the choice between state and federal law as the controlling question. Under any scenario, the case would eventually return to the court of appeals, which could then adhere to its prior opinion, and the question could then return to this Court (if four members still considered the issue certworthy). The question would be no easier to answer on the second attempt, but the parties would be much poorer for the experience and the courts below would have wasted considerable time and energy.

CONCLUSION

The decision of the Third Circuit should be reversed on the first question presented in the petition.

Respectfully submitted,

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